

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Petition for Declaratory Ruling and/or Waiver)	CG Docket No. 02-278
of Gilead Sciences, Inc., and Gilead Palo Alto, Inc.,)	
Regarding Substantial Compliance with)	CG Docket No. 05-338
Section 64.1200(a)(4)(iii) of the Commission's)	
Rules and for Declaratory Ruling Regarding the)	
Statutory Basis for the Commission's Opt-Out)	
Notice Rule with Respect to Faxes Sent with the)	
Recipient's Prior Express Invitation or Permission)	

PETITION FOR DECLARATORY RULING AND/OR WAIVER

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Executive Summary

Gilead Sciences, Inc., and Gilead Palo Alto, Inc., (collectively, “Gilead”) acting pursuant to the approach set forth by the U.S. Court of Appeals for the Eighth Circuit in *Nack v. Walburg*, respectfully request that the Commission issue a declaratory ruling clarifying that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, and (2) includes an opt-out notice on the first page of the fax that complies substantially with Section 64.1200(a)(4)(iii) of the Commission’s rules, does not violate any Commission regulation promulgated pursuant to Section 227(b)(2)(D) or any other provision of the Communications Act.

The fundamental purposes of the TCPA’s fax provisions are to protect consumers and businesses from unsolicited faxes and to ensure that fax advertisers provide consumers and businesses with effective opt-out mechanisms. In the context of solicited faxes, the Commission should rule that these purposes — and the Commission’s rules — are satisfied, so long as the fax contains an effective opt-out notice in substantial compliance with Section 64.1200(a)(4)(iii). In the absence of such a ruling, Gilead respectfully requests that the Commission grant Gilead a waiver of Sections 64.1200(a)(4)(iii) and (iv) with respect to faxes that have been transmitted by or on behalf of Gilead under the above-described circumstances. Punishing entities that may have excluded minor, technical statements from otherwise valid opt-out disclosures does nothing to protect consumers and businesses, while exposing legitimate enterprises that act in good faith to potentially staggering levels of statutory damages based on alleged minor technical faults.

In the alternative, Gilead respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) was not promulgated pursuant to Section 227(b) of the Communications Act. The plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited

faxes. Thus, the Commission regulation purportedly extending opt-out notice requirements to *solicited* faxes logically could not have been adopted under Section 227(b). The Commission should acknowledge as much in order to halt the flood of frivolous litigation that both burdens defendants and wastes judicial resources on claims Congress never intended to authorize.

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PETITION FOR DECLARATORY RULING AND/OR WAIVER

Pursuant to Section 1.2 of the Commission’s rules, and the approach set forth by the U.S. Court of Appeals for the Eighth Circuit (“Eighth Circuit”) in *Nack v. Walburg*,¹ Gilead Sciences, Inc., and Gilead Palo Alto, Inc., (collectively, “Gilead”)² respectfully request that the Commission issue a declaratory ruling clarifying that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, and (2) includes an opt-out notice on the first page of the fax that complies substantially with Section 64.1200(a)(4)(iii) of the Commission’s rules, does not violate any Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the Communications Act. In the absence of such a ruling, Gilead respectfully requests that, pursuant to Section 1.3 of the Commission’s rules, the

¹ *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013).

² Gilead Palo Alto, Inc., a wholly owned subsidiary of petitioner Gilead Sciences, Inc., currently is a defendant in a putative class action lawsuit under the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005. For convenience, this Petition uses “Gilead” to refer collectively to Gilead Sciences and Gilead Palo Alto.

Commission grant Gilead a waiver of Sections 64.1200(a)(4)(iii) and (iv) with respect to faxes that have been transmitted by or on behalf of Gilead under the above-described circumstances.

In the alternative, Gilead respectfully requests that the Commission issue a declaratory ruling clarifying that, with respect to *solicited* faxes — that is, faxes transmitted pursuant to the prior express invitation or permission of the fax recipient — the opt-out notice requirements set forth in Section 64.1200(a)(4)(iii) of the Commission’s rules were not promulgated pursuant to Section 227(b) of the Communications Act, because the plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited faxes.

Introduction & Background

The need for Commission action on the issues raised in this petition has become urgent. In recent years, plaintiffs’ attorneys have filed countless putative class action lawsuits against companies, such as Gilead, for alleged violations of the fax provisions of the Telephone Consumer Protection Act of 1991,³ as amended by the Junk Fax Prevention Act of 2005⁴ (together, the “TCPA”), and related Commission regulations. It is not uncommon for plaintiffs to seek millions of dollars or more in statutory damages for alleged violations that, as a practical matter, have a negligible to non-existent effect on consumers and businesses.

In recent years, plaintiffs have begun targeting *solicited* faxes, which the TCPA never was intended to regulate. In May, the Eighth Circuit issued an opinion in one of these lawsuits. In *Nack v. Walburg*, the defendant transmitted to the plaintiff a single solicited fax that

³ Pub. L. No. 102-243, 105 Stat. 2394, § 3(a) (1991), *codified at* 47 U.S.C. § 227.

⁴ Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

did not contain opt-out language that the plaintiff claimed was prescribed by the Commission’s regulations.⁵ The defendant argued that the opt-out requirement set forth in the Commission’s rules applied only to *unsolicited* faxes based on the plain language of the authorizing statute, the TCPA.⁶ The trial court agreed, interpreting the regulation as not covering solicited faxes, and granted the defendant summary judgment.⁷ The Eighth Circuit, for its part, was skeptical that the Commission possessed the authority to prescribe an opt-out requirement for solicited faxes, but it ultimately reversed the trial court because it determined that the Administrative Orders Review Act (“Hobbs Act”)⁸ limited its ability to rule on the merits of the defendant’s position.⁹ Of significance, however, the Eighth Circuit recognized that this outcome placed the defendant in an untenable position and therefore suggested that the appropriate course for securing a merits ruling on this question would be to, first, seek an administrative ruling from the Commission and then, if necessary, seek judicial review of that ruling on the merits.¹⁰

Here, Gilead is defending against a TCPA lawsuit and finds itself in a procedural posture similar to the *Nack* defendant’s. Specifically, Gilead is a defendant in a putative class action lawsuit filed by the St. Louis Heart Center (“SLHC”) — a serial TCPA plaintiff represented by a serial TCPA plaintiffs’ counsel.¹¹ The claim against Gilead, like the claim

⁵ *Nack*, 715 F.3d at 682.

⁶ *Id.*

⁷ *Nack v. Walburg*, 2011 WL 310249, at *5 (E.D. Mo. Jan. 28, 2011), *rev’d and remanded*, 715 F.3d 680 (8th Cir. 2013).

⁸ 28 U.S.C. § 2342, *et seq.*

⁹ *Nack*, 715 F.3d at 682.

¹⁰ *Id.* at 687.

¹¹ It is significant to note that SLHC’s counsel has repeatedly represented SLHC in the following TCPA cases in Missouri courts alone: *See, e.g., St. Louis Heart Ctr., Inc. v. Jackson & Coker* (continued...)

against the *Nack* defendant, rests on the transmission of a single solicited fax bearing an allegedly insufficient opt-out notice.¹² Unlike the defendant in *Nack*, however, Gilead’s solicited fax *did* contain an opt-out notice. The SLHC simply alleges that the opt-out notice did not track word-for-word the requirements of Section 64.1200(a)(4)(iii) and thus was defective.

The SLHC has filed several other similar TCPA actions against a range of defendants in the Eastern District of Missouri — and on similarly specious grounds. Despite the proliferation of lawsuits, however, the SLHC hardly resembles the sort of aggrieved consumer or business that either Congress or the Commission sought to protect when they enacted and implemented the TCPA. Indeed, contrary to the SLHC’s initial allegations, there no longer is any dispute that the SLHC *expressly consented* to receive the fax at issue.¹³ Only more than two years after receiving the December 2010 fax at issue did the SLHC even file its lawsuit, which

Locumtenens, LLC, Case No. 4:11-cv-01193 (E.D. Mo.) (filed in state court on May 16, 2011, and subsequently removed on July 7, 2011); *St. Louis Heart Ctr., Inc. v. Vein Centers For Excellence, Inc.*, Case No. 4:12-cv-00174 (E.D. Mo.) (filed in state court on December 23, 2011, and subsequently removed on January 31, 2012); *St. Louis Heart Ctr., Inc. v. Cintas Corporate Services, Inc.*, Case No. 4:12-cv-01547 (E.D. Mo.) (filed in state court on July 12, 2012, and subsequently removed on August 28, 2012, and dismissed on June 10, 2013); *St. Louis Heart Ctr., Inc. v. Harris Medical Associates, LLC*, Case No. 4:12-cv-01555 (E.D. Mo.) (filed in state court on July 12, 2012, and subsequently removed on August 28, 2012); *St. Louis Heart Ctr., Inc. v. Caremark, L.L.C.*, Case No. 4:12-cv-02151 (E.D. Mo.) (filed in state court on October 4, 2012, and subsequently removed on November 16, 2012); *St. Louis Heart Ctr., Inc. v. Forest Pharmaceuticals, Inc.*, Case No. 4:12-CV-02224 (E.D. Mo.) (filed in state court on October 4, 2012, and subsequently removed on November 30, 2012).

¹² See First Amended Class Action Petition at ¶¶ 11-20, Doc. No. 20, *St. Louis Heart Ctr., Inc. v. Gilead Palo Alto, Inc.*, Case No. 4:13-cv-00958-NAB (E.D. Mo. June 28, 2013), (“*SLHC First Amended Petition*”).

¹³ Compare Class Action Petition at ¶ 11, Doc. No. 5, *St. Louis Heart Ctr., Inc. v. Gilead Palo Alto, Inc.*, Case No. 4:13-cv-00958-NAB (E.D. Mo. May 20, 2013), (“*SLHC Initial Petition*”) (alleging defendants sent plaintiff an “unsolicited” fax) with *SLHC First Amended Petition* at ¶¶ 11-20 (alleging only that defendants’ fax contained non-compliant opt-out notice).

now stems solely from allegations of minor, technical violations of the TCPA and Commission regulations that, practically speaking, could not have possibly caused the SLHC harm.

Importantly, the solicited fax at issue provided the SLHC with the same practical protections prescribed by the Commission’s regulations for unsolicited faxes — even though the TCPA does not confer authority over solicited faxes. Nevertheless, Gilead must now defend itself against the allegation that, even though the fax transmitted was solicited, and even though it contained an opt-out notice on the first (and only) page, that opt-out notice was allegedly insufficient because it failed to include certain minor, technical statements set forth in Section 64.1200(a)(4)(iii) and, thus, should subject Gilead to significant liability. The SLHC’s argument is that any deviation from the prescriptions of Section 64.1200(a)(4)(iii), no matter how minor, immaterial or technical, amounts to a cognizable “violation” under Section 227(b) of the Communications Act and thereby provide SLHC a private right of action.¹⁴

The outcome the SLHC is pursuing is absurd, contrary to public policy, and manifestly unjust. Such an outcome would impose unintended and unjustifiable burdens both on regulated companies and on the courts required to adjudicate these frivolous claims. In accordance with the Eighth Circuit’s instruction in *Nack*, Gilead therefore is seeking administrative relief from the Commission so that the District Court — and, if necessary, the

¹⁴ 47 U.S.C. § 227(b)(3) (“A person or entity may . . . bring in an appropriate court of that State—(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to . . . receive \$500 in damages for each such violation . . . , or (C) both such actions”). Section 227(b)(3) goes on to state that “[i]f the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award” available under Section 227(b)(3)(B) by three times, so up to \$1,500 for each violation.

Eighth Circuit or another appropriate appeals court — can address the merits of Gilead’s defense.

Section 227(b) addresses only “unsolicited advertisements,” which are defined by the statute’s plain language to *exclude* faxes that are transmitted with a person’s “prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5). Nowhere does Section 227(b) regulate the transmission of *solicited* faxes or confer that authority on the Commission. Although Sections 227(b)(1)(C) and (2)(D) of the Communications Act together prescribe what information must be included in an opt-out notice on the first page of an *unsolicited* fax, they impose no similar requirement for *solicited* faxes. As a consequence, to the extent the Commission has any authority at all to impose opt-out notice obligations on *solicited* faxes, it necessarily also must possess the authority to conclude that, on a lesser level, an opt-out notice on the first page of a *solicited* fax that is in substantial compliance with the requirements of Section 64.1200(a)(4)(iii) does not violate a Commission regulation promulgated pursuant to Section 227(b)(2)(D) or any other provision of the Communications Act. This Petition asks the Commission to make such a finding — either in the form of a declaratory ruling or waiver — based on the facts and circumstances described herein.

If the Commission is unwilling to make such a finding, then Gilead respectfully requests that the Commission issue a declaratory ruling to clarify, based on the TCPA’s plain language, that the Commission’s regulations regarding *solicited* faxes cannot and do not rely on the TCPA for their statutory authority. It is past time for the Commission to address this argument on its merits, as other parties previously have requested. Companies such as Gilead that comply or comply substantially with the plain language of the TCPA and related Commission regulations for solicited faxes should not have to continue to defend themselves

against specious legal claims such as the one continuously being leveled by the SLHC. If the Commission is unwilling to provide the other relief requested herein, the principles of prudence, sound public policy, and reasoned decision-making suggest that these companies, at minimum, are entitled to a Commission decision addressing this issue squarely so that the companies may mount a full defense in court.

Argument

I. The Commission Should Confirm that Gilead Satisfied the Commission’s Opt-Out Disclosure Rules and Thus Did Not Violate Sections 64.1200(a)(4)(iii) and (iv) of the Commission’s Rules.

When Congress enacted the TCPA, one of its purposes was to establish restrictions on the use of fax machines to transmit “unsolicited advertisements” — that is, “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”¹⁵ Section 64.1200 of the Commission’s rules sets forth various requirements for companies that transmit unsolicited faxes, including authority to transmit unsolicited faxes to parties with whom the sender has an established business relationship, provided that the faxes include an opt-out notice and comply with other requirements.¹⁶

The fax at issue in Gilead’s case is very different from the unsolicited advertisements Congress sought to restrict. In the first place, Gilead’s fax was an informational message inviting Dr. Ronald Weiss (“Dr. Weiss”) — a physician at the SLHC and its sole officer and director — to attend a speaker program in which an expert speaker would present clinical

¹⁵ 47 U.S.C. § 227(a)(5).

¹⁶ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(4)

data on Ranexa®. Gilead’s fax also was not “unsolicited.” It was sent only to the physician who opted in to receive it, and records show that the SLHC or one of its agents agreed to receive the fax at issue.¹⁷ Indeed, in the course of the litigation between Gilead and the SLHC, Gilead has described precisely how the SLHC consented to receive the fax.¹⁸

Because the SLHC provided its prior express invitation or permission to transmit the fax at issue, the fax was not *unsolicited* and therefore falls outside the scope of Section 227(b) of the Act.¹⁹ Nonetheless, the *solicited* fax in fact satisfied or was in substantial compliance with the Commission’s rules governing unsolicited faxes. As discussed above, the SLHC had consented to receive the fax and voluntarily provided its fax number. Each fax also contained a clearly legible notice on the first page informing the recipient of the ability and means to avoid future faxes.²⁰ Specifically, the opt-out notice informed recipients they could call a specified phone number or fax a request to a specified fax number²¹ in order to request exclusion from either faxes “for Ranexa” or “fax messages from The Peer Group” in general.

¹⁷ These records include sworn testimony and documents presented in the related case of *St. Louis Heart Center, Inc. v. Forest Pharmaceuticals, Inc.*, Case No. 4:12-cv-2224-JCH (E.D. Mo.). Forest has filed its own petition with the Commission, seeking relief similar to the relief sought in this petition. Similarly, Staples, Inc. and Quill Corporation filed a joint petition asking the Commission to repeal Section 64.1200(a)(3)(iv) of its rules and to issue a declaratory ruling clarifying that the rule has never required that solicited fax advertisements contain an opt-out notice. Neither petition has yet been placed on public notice.

¹⁸ The Peer Group, Inc. (“Peer”), a co-defendant in the SLHC’s suit against Gilead, co-sponsored the program, maintained the contact database, secured recipients’ consent, managed contact and opt-out preferences, and faxed the invitations.

¹⁹ 47 U.S.C. § 227(b)(1)(C). Section 64.1200(a)(4)(iv) of the Commission’s rules purports to require fax advertisers to include an opt-out notice even on faxes sent with the recipients’ prior express invitation or permission. As is discussed in Part II, *infra*, Gilead requests that the Commission clarify that the statutory basis for this rule could not have been Section 227(b) of the Act.

²⁰ See § 64.1200(a)(4)(iii).

²¹ See § 64.1200(a)(4)(iii)(B), (D)(1).

The opt-out numbers were cost-free and available 24 hours a day, 7 days a week.²² The SLHC has never alleged it ever opted out, or even attempted to opt out, of receiving future faxes.

Despite these facts, the SLHC persists in claiming that the fax was unlawful because the opt-out notice on the first page did not specify that opt-out requests must be honored within 30 days or set forth the specific information recipients would need to provide when submitting opt-out requests.²³ However, in Gilead’s case, any such deviations were immaterial, did nothing to impede the SLHC’s ability to opt out of receiving future faxes, and did nothing to impede the SLHC’s opt-out requests from being honored on a timely basis. Indeed, records introduced in related litigation show that Dr. Weiss’s office confirmed in August 2010 — prior to the transmission of the fax at issue in Gilead’s case — that Dr. Weiss wished to continue to receive communications through facsimile transmissions at his fax number, but that he wished to opt-out of receiving email communications. Even by the SLHC’s own definition, its current complaint challenges nothing more than “Defendants’ practice of sending facsimile advertisements without the proper opt-out notice as required by 47 C.F.R. 64.1200.”²⁴

The Commission should issue a declaratory ruling to clarify that a fax sent pursuant to the recipient’s prior express invitation or permission and that includes a demonstrably effective opt-out notice on the first page of the fax complies substantially with 47 C.F.R. § 64.1200, even if the opt-out notice does not conform to the letter of the rule defining the

²² See § 64.1200(a)(4)(iii)(D)(2), (E).

²³ See § 64.1200(a)(4)(iii)(B), (C) (requiring opt-out notices to specify that valid opt-out requests must be honored within 30 days and to explain that valid requests must identify the fax numbers to which the opt-out request relates, use the designated opt-out channel, and not be superseded by the recipient’s subsequent prior express invitation or permission for the sender to send additional fax advertisements).

²⁴ *SLHC First Amended Petition* at ¶ 1.

opt-out notice required for *unsolicited* faxes. This would not require a novel undertaking. In other contexts, the Commission has recognized that “absolute compliance with each component of the rules may not always be necessary to fulfill the purposes of the statute.”²⁵ Here, the opt-out notice provided in the faxes — which the SLHC expressly invited — fulfilled the purposes of the TCPA: protecting consumers and businesses from unsolicited faxes and ensuring that fax advertisers provide effective opt-out mechanisms. The Commission itself recognized in the *Junk Fax Order* that it was unnecessary to specify minutiae such as “the font type, size and wording of the notice,” and that doing so “might interfere with fax senders’ ability to design notices that serve their customers.”²⁶ In this case, requiring “absolute compliance with each component of the rules” does nothing to protect consumers. Instead, such a rigid interpretation exposes legitimate enterprises that act in good faith — and that design notices that demonstrably served

²⁵ *Provision of Improved Telecommunications Relay Services and Speech-To-Speech Services for Individuals with Hearing and Speech Disabilities*, 20 FCC Rcd 5433, 5445 (2005) (internal quotations omitted) (noting a TRS provider may be eligible for TRS Fund reimbursement “if it has substantially complied with Section 64.604”).

²⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 *et al.*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3801 (2006) (“*Junk Fax Order*”). *Cf. Facilitating the Deployment of Text-to-911 & Other Next Generation 911 Applications*, PS Docket No. 11-153 *et al.*, Report and Order, 28 FCC Rcd 7556, 7581 (2013) (declining to require specific wording in text providers’ bounce-back messages informing consumers when text-to-911 is not available, in order to “afford[] covered text providers with the necessary guidance and flexibility to create bounce-back messages that are understood by their particular consumer base”); *Implementation of Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information et al.*, CG Docket No. 96-115 *et al.*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 F.C.C.R. 14860, 14907 (2002) (declining “to mandate specific language” carriers must use when describing consequences of customer’s denying carrier access to CPNI, based on conclusion that rules “provide carriers with sufficient guidance to formulate scripts that inform customers in a neutral manner of significant consequences, without unduly restricting carrier flexibility in delivering the message”).

their customers — to potentially staggering levels of statutory damages based on minor technical faults to which no one objects for years after transmission.

In the alternative, Gilead asks the Commission to waive strict compliance with Sections 64.1200(a)(4)(iii) and (iv) with respect to the fax in question, pursuant to the Commission’s authority under Section 1.3 of its rules.²⁷ The Commission may waive any provision of its rules “for good cause shown”²⁸ when it concludes that a waiver would serve the public interest, considering all relevant factors.²⁹ For the reasons discussed above, a limited waiver with respect to the fax at issue in Gilead’s case would serve the public interest by avoiding an abuse of the private right of action created by the TCPA. It is undisputed that the fax in question was sent pursuant to the SLHC’s prior express invitation or permission and that it included a clear and effective opt-out notice on the first page describing cost-free opt-out mechanisms. It does not serve the public interest, the TCPA’s statutory purposes, nor the interests of justice to impose potentially staggering statutory damages on the basis of the alleged minor technical defects — ones that elevate form over substance — of which SLHC complains.

In other contexts, the Commission has retroactively waived similarly minor violations of its rules. For instance, the Commission granted a conditional retroactive waiver to a manufacturer of improperly labeled emergency telephones for elevators, in part based on its conclusion that, under the circumstances, no harm to the Public Switched Telephone Network

²⁷ 47 C.F.R. § 1.3.

²⁸ *Id.*

²⁹ See *Rath Microtech Complaint Regarding Electronic Micro Systems, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16710, 16714 (Network Servs. Div. 2005) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964))

had occurred or was likely to occur, and affected purchasers “have actual knowledge of the manufacturer’s identity, and thus have not been harmed by the improper labeling.”³⁰ Similar logic supports the waiver requested here: the use of an effective opt-out notice on a fax that was expressly invited or permitted by the recipient caused no harm to the SLHC or to the public interest, particularly given the evidence that the recipient in this case had actual knowledge of how to opt out of receiving future faxes. Given the draconian consequences that could attach to minor failures under the SLHC’s theory of the scope of the TCPA private right of action, there is good cause for the Commission to waive these defects to the extent the Commission does not find Gilead was in substantial compliance with Sections 64.1200(a)(4)(iii) and (iv) of the rules.

II. The Commission Should Clarify that the Requirements It Imposed on Solicited Faxes Were Not, and Could Not Have Been, Promulgated Under Section 227(b) of the Communications Act.

If the Commission does not find that Gilead was in substantial compliance with Section 64.1200 of the Commission’s rules — or that any technical failures should be waived — the Commission should clarify that its rule requiring solicited faxes to include the same opt-out notice as unsolicited faxes was not promulgated under Section 227(b) of the Communications Act. A declaratory ruling clarifying the scope and basis of this rule is appropriate and necessary, given the Commission’s contradictory statements and its questionable authority to require opt-out notices on solicited faxes.

Section 227(b)(1) of the Communications Act makes it unlawful for any person “to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an *unsolicited advertisement*” unless certain requirements are met, including

³⁰ *Rath Microtech Complaint*, 16 FCC Rcd at 16713 & n.18, 16715.

that the sender has an established business relationship with the recipient and the fax displays an opt-out notice meeting the statutory criteria.³¹ The Act explicitly defines an “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission*, in writing or otherwise.”³² By its terms, then, the statutory restrictions — including the opt-out-notice requirement — do not apply to any fax advertisements sent *with* the recipient’s prior express invitation or permission. Yet Section 64.1200(a)(4)(iv) of the Commission’s rules purports to impose an opt-out-notice requirement on any fax advertisement “that is sent to a recipient that has provided prior express invitation or permission.”³³

The order adopting this rule offered inconsistent explanations of the rule’s scope, stating first that “the opt-out notice requirement only applies to communications that constitute *unsolicited advertisements*,”³⁴ while later making the contradictory assertion that “entities that send facsimile advertisements to consumers *from whom they obtained permission*[] must include on the advertisements their opt-out notice and contact information.”³⁵ Though the former explanation is more consistent with the TCPA’s text and legislative history, the Commission since has taken the position that the rule does indeed require opt-out notices on solicited faxes. However, it is at best questionable whether Congress or the Commission could validly impose

³¹ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

³² § 227(a)(5) (emphasis added).

³³ 47 C.F.R. § 64.1200(a)(4)(iv).

³⁴ *Junk Fax Order*, 21 FCC Rcd at 3810 n.154 (emphasis added).

³⁵ *Id.* at 3812 (emphasis added).

such a requirement on solicited faxes consistent with the First Amendment. It is well-established that in order to burden truthful commercial speech, the government must show its proposed restrictions serve “a substantial interest,” that the restrictions “directly advance the state interest involved,” and that the asserted interest could not “be served as well by a more limited restriction on commercial speech.”³⁶ It is difficult to imagine that the detailed opt-out notice required on *unsolicited* faxes would pass muster under this standard as the most limited means available to address any substantial state interest in regulating *solicited* faxes. Indeed, the Eighth Circuit recently expressed skepticism over precisely this point in *Nack*. The court noted that, although it previously found “the TCPA provisions regarding unsolicited fax advertisements were not an unconstitutional restriction upon commercial speech” under the *Central Hudson* test, that analysis and conclusion “would not necessarily be the same if applied to the agency’s extension of authority over solicited advertisements.”³⁷

Faxes sent pursuant to the recipient’s express permission or invitation certainly implicate no state interest in “protecting the public from the cost shifting and interference caused by *unwanted* fax advertisements.”³⁸ The Commission has never identified any other state interest sufficient to justify regulations dictating the contents of consensual communications between commercial entities, particularly under circumstances where the recipient clearly knows how to submit an effective opt-out request. Indeed, attempting to control consensual communications to such a degree under such circumstances would not only raise First

³⁶ *Central Hudson Gas & Elec. Corp. v. Public Servo Comm’n*, 447 U.S. 557, 564 (1980)

³⁷ *Nack*, 715 F.3d at 687 (declining to consider constitutional challenge raised for the first time on appeal).

³⁸ *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (2003) (emphasis added).

Amendment concerns, but also would be sufficiently arbitrary and capricious so as to raise serious due process concerns under the Fifth Amendment. These due process concerns are amplified if the rules governing solicited faxes under such circumstances purportedly were promulgated under a statutory authority that could expose fax senders to excessive statutory damages that are radically disproportionate to the *de minimis* actual damages, if any, sustained by recipients.

Even assuming that imposing an opt-out notice requirement on solicited faxes could be constitutional in the abstract, however, the scope of Commission rules adopted pursuant to a statutory provision cannot be broader than the authority conferred by the statute itself.³⁹ Thus, if the Commission had authority to regulate the opt-out notices provided on solicited faxes, such authority must derive from some statutory provision *other than* Section 227(b) of the Act. If that is the case, then alleged violations of the Commission’s rules governing solicited faxes cannot be the basis for a private suit brought under the TCPA.⁴⁰ Therefore, the Commission should if nothing else issue a declaratory ruling clarifying that the statutory provision the Commission relied on in promulgating Section 64.1200(a)(4)(iv) of its rules was *not* Section 227(b) of the Communications Act.

Of significance, the Consumer & Governmental Affairs Bureau failed to address the controversy at issue here when it dismissed a petition seeking a similar clarification regarding

³⁹ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”); *Am. Library Ass’n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”).

⁴⁰ See 47 U.S.C. § 227(b)(3).

the *Junk Fax Order*'s statutory basis for promulgating Section 64.1200(a)(4)(iv). The Bureau concluded that there was “no issue of controversy or uncertainty” because “[t]he *Junk Fax Order* cited the statutory provisions, including section 227 of the Act, that provide the Commission authority for the rules adopted in that Order.”⁴¹ But the Bureau’s answer — which is under review by the full Commission — evaded the point of the question before it.⁴² The Bureau ignored the contradictory language in the *Junk Fax Order* and instead simply referred to a paragraph of the *Order* that cited 11 separate statutory provisions as authority for the rules adopted in the *Order*. The *Junk Fax Order* never stated that *every* specific rule adopted in the *Order* was adopted under the authority of *every* provision cited at the end of the *Order*, or even that *every* rule was adopted under the authority of Section 227. If the Commission believes either of those propositions to be the case, it should say so clearly and be willing to defend that view before a reviewing court.⁴³

⁴¹ *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, CG Docket No. 05-338, DA 12-697, at ¶ 5 (CG May 2, 2005) (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3788 at ¶ 64 (2006)).

⁴² *See Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, CG Docket No. 05-338, Application for Review, filed May 14, 2012.

⁴³ The Eighth Circuit’s recent panel decision in *Nack* held that the Hobbs Act generally precludes a civil defendant from mounting “a defense that a private enforcement action is based upon an invalid agency order” except by presenting its argument for an administrative determination by the agency and, if necessary, judicial review of that determination pursuant to the Hobbs Act. *Nack*, 715 F.3d at 685-86. If that holding is correct, it only underscores the Commission’s obligation to address Gilead’s petition — and similar petitions filed by other parties — on the merits.

Notwithstanding the Commission’s ultimate determination on the merits, an administrative determination of these issues is needed urgently. The Commission’s improper attempt to extend hyper-technical opt-out requirements to solicited faxes has encouraged a torrent of frivolous litigation, such as the SLHC’s cases. These cases not only burden defendants but also waste judicial resources on claims Congress never intended to create. In its recent opinion addressing precisely this question in *Nack*, the Eighth Circuit concluded that it is “questionable whether the regulation at issue [as interpreted by the FCC] properly could have been promulgated under the statutory section that authorizes a private cause of action.”⁴⁴ At most, the court concluded, the Commission’s rationale for these regulations only “arguably brings the regulation within range of what § 227(b) authorized the FCC to regulate.”⁴⁵ The Eighth Circuit concluded that under the circumstances it would not be “possible or prudent for our court to resolve this issue without the benefit of full participation by the agency,” while specifically noting that the District Court on remand “may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.”⁴⁶ Gilead brings this Petition seeking precisely such an administrative determination. The Commission has an obligation to regulated entities, TCPA litigants, and the court system to respond directly and promptly to the issues raised in this Petition and in similar petitions.

⁴⁴ *Nack*, 715 F.3d at 682.

⁴⁵ *Id.* at 687.

⁴⁶ *Id.*

Conclusion

For the reasons stated above, the Commission should issue a declaratory ruling clarifying that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, and (2) includes an opt-out notice on the first page that complies substantially with Section 64.1200(a)(4)(iii) of the Commission's rules, does not violate any Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the Communications Act. In the absence of such a ruling, the Commission should grant Gilead a waiver of Sections 64.1200(a)(4)(iii) and (iv) of the Commission's rules under the circumstances described herein. In the alternative, the Commission should issue a declaratory ruling clarifying that, with respect to *solicited* faxes, the opt-out notice requirements set forth in Section 64.1200(a)(4)(iv) of the Commission's rules were not promulgated pursuant to Section 227(b) of the Communications Act, because the plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited faxes.

Respectfully submitted,

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Dated: August 9, 2013

Declaration of Matt Lang

I have read the foregoing Petition, and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry.

Executed on August 8, 2013

A handwritten signature in black ink, appearing to read "Matt Lang", is written over a solid horizontal line.

Matt Lang
Associate General Counsel
Gilead Sciences, Inc.